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Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Petition of MCI for Declaratory	)	
Ruling that New Entrants Need Not	)	CCBPol 97-4
Obtain Separate License or Right-to-Use	)	CC Docket No. 97-98
Agreements Before Purchasing Unbundled	)	
Network Elements Under Section 251(c)(3)	)	
of the Telecommunications Act of 1996	)	

TO: The Commission

COMMENTS OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"),[1] by its attorneys, submits these comments in support of the petition filed by MCI on March 11, 1997 for a declaratory ruling that Sections 251 and 253 of the Telecommunications Act of 1996 ("1996 Act") prohibit incumbent local exchange carriers ("ILECs"), on their own or pursuant to an interconnection agreement approved by a state commission, from prohibiting new entrants from purchasing or accessing an unbundled network element under Section 251(c)(3) until they have secured licenses from third-party vendors for any intellectual property that may arguably be embedded in that element.

[1] CompTel is an industry association whose membership includes more than 200 providers of competitive telecommunications services.

The rules adopted by the Commission in the Interconnection Order[2] prohibit an ILEC from requiring a requesting telecommunications carrier to obtain a license before purchasing, accessing or using an unbundled network element. Section 51.309(a) provides that an ILEC

> "shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."

On its face, that provision precludes the type of conduct that MCI has documented in its petition. Whether through a Statement of Generally Available Terms ("SGATs") or an interconnection agreement approved by a state commission, the Commission's rules prohibit ILECs from imposing licensing conditions upon the purchase or use of network elements. Section 51.309(a) is not subject to the stay granted by the Eighth Circuit in Iowa Public Utilities Board v. FCC (Nos. 96-3321 and consolidated cases) and, therefore, is in full force and effect.

Furthermore, the licensing condition is contrary to the non-discrimination provisions in the 1996 Act and the Commission's implementing rules. Section 251(c)(3) requires the ILECs to offer "nondiscriminatory access" to network elements at "rates, terms, and conditions that are just, reasonable and nondiscriminatory." 47 U.S.C. § 251(c)(3). The Commission implemented that provision by adopting Section 51.313(b), which provides that an ILEC may not offer network elements to new entrants on less favorable terms than it

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[2] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, rel. Aug. 8, 1996 ("Interconnection Order").

provides such elements to itself. 47 C.F.R. § 51.313(b). At a minimum, those provisions mean that an ILEC may not negotiate an intellectual property license so that it may provide services to selected classes of customers over its local exchange network while excluding carriers who purchase network elements. An ILEC cannot use any network facilities to provide telecommunications services unless and until all requesting carriers are able to use such facilities through the purchase of network elements under Section 251(c)(3). Similar to Section 51.309(a), the non-discrimination provisions in the Commission's rules, including Section 51.313(b), have not been stayed and are in full force and effect.

Any ILEC who desires to impose a licensing condition upon requesting telecommunications carriers first must apply for and obtain from the Commission a waiver of Sections 51.309(a) and 51.313(b). Imposing a waiver requirement upon the ILECs is both necessary and logical. It is necessary because the ILECs, not new entrants, are the parties who desire to include provisions in their SGATs or interconnection agreements that the Commission's rules expressly preclude. It is logical because only the ILECs have relevant information concerning (i) whether third-party intellectual property rights are embedded in network elements; (ii) the extent to which the license granted to the ILEC by the third-party vendor already encompasses the ILEC's provision of network elements and other telecommunications services to carriers; and (iii) the putative impossibility of negotiating a non-discriminatory license covering all services provided over the local exchange network, including network elements. While it is far from clear to CompTel that such a waiver could ever be in the public interest, CompTel submits that the waiver procedure is the only

appropriate vehicle for resolving whatever concerns the ILECs may have regarding the need for third-party licenses as a condition of providing network elements.

Moreover, imposing a waiver requirement upon the ILECs would promote the public interest because the alleged need for third-party intellectual property licenses has every earmark of being an illusory requirement concocted by one ILEC (i.e., Southwestern Bell Telephone Company) for the transparent purpose of thwarting local entry. In particular, the ILECs use the same local exchange network to furnish network elements that they use to furnish intrastate and interstate access services. As a result, to the extent there is any legitimate need for a third-party intellectual property license, it should apply equally to network elements and access services. That ILECs have provided access services consistently for nearly 15 years without even a hint that such licenses were required establishes a similar presumption for network elements. One ILEC's recent suggestion that carriers may need third-party licenses to purchase network elements, but not access services, removes any doubt that the ILECs are proffering the license condition as a self-serving pretext for their decision not to comply with their obligations under the 1996 Act.

In the event that an ILEC fails to obtain the necessary waiver but nevertheless inserts a licensing condition into an interconnection agreement or SGAT as approved by a state commission, the Commission should declare that it will preempt such conditions under the 1996 Act. Sections 253(a) and (d) require the Commission to preempt any state or local legal requirements that "prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate telecommunications service." See 47 U.S.C. §§ 253(a), (d). A license condition would be an enormous impediment to local entry through network elements.

The cost of obtaining multiple licenses from third-party vendors would be prohibitive even for the largest carriers. Most carriers would not even have the resources to make such an effort, and would instead forego plans to enter the local market. The inevitable consequences of the licensing condition -- which of course is precisely why Southwestern Bell Telephone Company has proposed it -- would be to eliminate entry altogether for most carriers and to delay indefinitely local entry by the largest carriers. Therefore, the Commission is both authorized and required to preempt such conditions under Section 253.

Finally, the Commission has independent authority to preempt such a condition as a violation of the 1996 Act and the Commission's rules implementing the Act. Under a long line of precedent, the Commission is entitled to preempt state actions that violate the terms of the Communications Act of 1934, as amended by the 1996 Act.[3] Further, the Commission has plenary authority to preempt state action that is inconsistent with the Commission's rules when the interstate and intrastate aspects of the issue cannot reasonably be severed.[4] In this case, the interstate and intrastate aspects of network elements are inherently inseverable because Congress deliberately supplanted the pre-existing dual regulatory system with an unseparated regime under Section 251.[5] Based upon these statutory grounds, the Commission can and should preempt any state actions seeking to

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[3] E.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963); Federal Preemption of State and Local Laws Concerning Amateur Operator Use of Transceivers Capable of Reception Beyond Amateur Service Frequency Allocations, 8 FCC Rcd 6413, 6415 (1993).

[4] See Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

[5] E.g., Interconnection Order at ¶ 83.

impose a license condition upon the purchase or use of network elements in violation of Section 251(c)(3) of the 1996 Act and the rules adopted by the Commission to implement that provision.

Respectfully submitted,

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Date: April 15, 1997

CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that I have served a copy of the foregoing "Comments of the Competitive Telecommunications Association" on this 15th day of April, 1997, upon the following parties via first class mail, postage prepaid:

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